



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
To consultation@bia.gov*

August 20, 2024

The Honorable Brian Newland
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Dear Assistant Secretary Newland,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of the Interior's (DOI) Notice of Proposed Rulemaking (NPRM) to amend the regulations governing implementation of subchapter IV of the Indian Self Determination and Education Assistance Act (ISDEAA) and DOI's Tribal Self-Governance Program, as required by the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes (PROGRESS) Act. While DOI has hosted several in-person Tribal consultations and one virtual, we understand that the Department is operating on an expedited timeline because it only has the authority to finalize the rules by December 21, 2024. We appreciate DOI's efforts to address these regulations, as well as the work of the Negotiated Rulemaking Committee's (NRC) Tribal and federal representatives to negotiate and generate text for the proposed rule. USET SPF generally supports the text of the proposed rule, however, we also agree with the NRC's Tribal representatives on areas where non-consensus was reached on certain regulatory issues and proposals. USET SPF's comments reinforce and support the Tribal positions section of the NRC's, "Self-Governance PROGRESS Act Negotiated Rulemaking Committee Final Federal Report", [submitted](#) on April 12, 2024.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

^[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

The PROGRESS Act sought to expand upon and improve the principles of self-governance and self-determination for Tribal Nations by streamlining and enhancing DOI's Tribal Self-Governance Program. In recognition of this USET SPF has supported legislative amendments to Title IV of ISDEAA to enhance DOI's Tribal Self-Governance Program for Tribal Nations, which is reflected by [USET Resolution No. 2014:047](#), "Support Legislative Amendments to Titles I and IV of the Indian Self-Determination and Education Assistance Act." The PROGRESS Act was the direct result of Congress acknowledging that there needed to be an overhaul of Title IV of ISDEAA to correct bureaucratic processes and procedures that the Tribal Self-Governance Program imposed that either discouraged or hindered negotiations between Tribal Nations and DOI for compacts or funding agreements.

USET SPF Supports Tribal Positions on Non-Consensus Issues for Amending Title IV of ISDEAA

USET SPF acknowledges the hard work of the NRC, as it has worked since August 29, 2022 to reach consensus on most subparts and regulatory provisions to implement the PROGRESS Act amendments to Title IV of ISDEAA. However, the non-consensus regulatory subparts and provisions omitted by DOI in the July 15, 2024 NPRM are significant, as they implicate the core purpose of the federal government's policy on Tribal self-governance and self-determination. As a matter of upholding the federal government's trust and treaty obligations to support our inherent sovereignty and self-determination, we strongly urge DOI to reconsider its position on the below issues when finalizing the proposed rule to implement amendments to Title IV of ISDEAA.

USET SPF supports the following positions of the NRC's Tribal representatives in the April 2024 Final Report. Of the approximately 350 proposed regulatory provisions, there are a few areas of disagreement that are of critical importance to Tribal Nations:

- **There were significant concerns regarding disagreement between the NRC's Tribal and federal representatives on how DOI should interpret the PROGRESS Act and ISDEAA, especially regarding ambiguity in interpreting statutory provisions.** As USET SPF has continuously asserted, the Indian Canons of Construction should always be applied during Tribal consultation activities, in the policymaking process, and beyond. That is, any ambiguities in law or policy should be interpreted in favor of Tribal Nations. Further, Sec. 6 of [Executive Order \(E.O.\) 13175](#), and Sec. 5 of the recent [E.O. 14112](#), establish directives for agencies to increase flexibility for Tribal Nations. Specifically, Sec. 6 of E.O. 13175 directs agencies to grant waivers of statutory and regulatory requirements for Tribal Nations to access federal programs. In addition, Sec. 5 of E.O. 14112 requires agencies to increase accessibility, equity, and flexibility, and utility of federal funding and support programs for Tribal Nations.

These directives should be taken into consideration by DOI while developing the final rules for amending Title IV of ISDEAA. More importantly, the final rules should not require Tribal Nation case-by-case reviews of requests to waive portions of the rules to fully support our inherent sovereignty to pursue and implement self-governance and self-determination activities. USET SPF agrees with and supports the Tribal positions articulated in the NRC's April 2024 Final Report that, "it is a well-established canon of statutory construction that statutes enacted for the benefit of Indians are to be interpreted liberally, with ambiguous provisions interpreted in favor the Indians." The NRC's Final Report points to established federal case law that supports this stance and references that, "Congress, by statute in 1994, required that the Indian canon be written into every self-determination contract." USET SPF also reiterates the Tribal positions of the NRC's Final Report stating, "Despite these clear declarations by Congress making the ISDEAA the paramount expression of Congressional intent, the Federal representatives to the Committee took several positions that represent a narrow reading of ISDEAA and the PROGRESS Act, and that undermine

the broad grant of authority to Tribes/Consortia to administer programs eligible for inclusion in a compact or funding agreement.”

- **DOI must refrain from relying on strict interpretation of Title IV of ISDEAA when identifying the minimum requirements for a compact and/or funding agreement.** Instead, DOI must accept written attestations from Tribal Nations that we will comply with Title IV of ISDEAA. As referenced in the NRC’s Final Report, “Federal representatives advanced a narrow and overly literal reading of 25 U.S.C. § 5365(a)’s requirement that an ‘Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of [Title IV].’” The NRC’s Tribal representatives asserted that this requirement could be met with language in either a compact or funding agreement that includes a general attestation from a Tribal Nation that it would comply with the requirements of Title IV of ISDEAA. Requiring Tribal Nations to adhere to a “laundry list of provisions mirroring the statutory sections”, would only serve to create an unduly burdensome and unnecessarily time-consuming requirement for Tribal Nations to meet pre-award, start-up, and direct contract support costs for funding agreements with non-Bureau of Indian Affairs agencies.

Further, the NRC Final Report notes that federal representatives would not agree to a Tribal proposal to clarify criteria for determining whether a function is inherently federal. Rather, the federal representatives adopted a narrow interpretation in Subpart F of the proposed rule stating that inherent federal function determinations are not a permissible discussion topic during negotiations. USET SPF supports the assertion of the NRC’s Tribal representatives in the Final Report that an inherent federal function and the calculation of such costs are appropriate subjects during the negotiation of a funding agreement, since each affects the amount of funds available for transfer to a funding agreement. We urge DOI to revise Subpart F of the proposed rules to reflect this stance in the final regulations.

- **USET SPF agrees with the Tribal representatives of the NRC that Tribal Nations should have the opportunity to assume responsibility for final environmental determinations for construction projects under Subpart K of the regulations.** The federal representatives advanced a narrow interpretation of ISDEAA at 25 U.S.C. § 5367(b), which states that, “in carrying out a construction project under this subchapter, an Indian tribe may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 [NEPA].” Under ISDEAA, a Tribal Nation can designate a Tribal official to, “assume the status of a responsible federal official” for purposes of NEPA. However, the federal representatives took the position that making environmental determinations in an inherent federal function that may not be delegated to a Tribal Nation. USET SPF agrees with the Tribal representatives that the federal government has been delegating this function to Tribal Nations for years pursuant to Title V of ISDEAA. Therefore, USET SPF supports the assertion made by the Tribal representatives that a Tribal official may assume the responsibility to make environmental determinations, such as approving documentation required under NEPA and related laws, and that these be included under Subpart K of the final regulations.
- **DOI has also taken a narrow position on the scope of decisions that may be administratively appealed to a bureau head or the Assistant Secretary in lieu of an appeal to the Interior Board of Indian Appeals (IBIA).** Due to the well-known challenges and delays associated with pursuing an appeal through the IBIA, Tribal representatives of the NRC recommended that all pre-award dispute decisions that fall within Subpart R of the proposed regulations should be eligible to be decided by a bureau head or the Assistant Secretary instead of going through the appeal

process of the IBIA. USET SPF supports the assertion of the Tribal representatives to directly appeal decisions to a bureau head or the Assistant Secretary due to the challenges and delays of pursuing administrative appeals through the IBIA. These delays can contribute to detrimental outcomes for Tribal Nations looking to utilize federal funds for projects that operate on strict timelines that are often external to the responsibilities of DOI. To ensure that these decisions are effectively streamlined, as was the purposed of enacting the PROGRESS Act, USET SPF supports the inclusion of language under Subpart R that recognizes that ability of Tribal Nations and consortium to directly appeal to a bureau head or the Assistant Secretary to settle these issues in a timely manner.

Conclusion

Since Congress enacted the PROGRESS Act to provide greater certainty and guidance on issues related to the Tribal Self-Governance Program, we do not agree with the assertions made by the federal representatives of the NRC to limit the scope of the law in regulations. Further, any ambiguities in the law should be construed for the benefit of Tribal Nations and consortiums looking to participate in the Tribal Self-Governance Program. As a matter of upholding its trust and treat obligations to support Tribal Nation rebuilding, and the already documented and well-known successes of the Tribal Self-Governance Program, we urge DOI to adopt the Tribal positions outlined in the "Self-Governance PROGRESS Act Negotiated Rulemaking Committee Final Federal Report" [submitted](#) to your office on April 12, 2024. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Chief Kirk Francis
President



Kitcki A. Carroll
Executive Director